

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

Via Email

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| Southwestern Bell Telephone Company |) | Proceeding Number 22-357 |
| d/b/a AT&T Texas, |) | Bureau ID Number EB-22-MD-004 |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | |
| |) | |
| AEP Texas, Inc. |) | |
| |) | |
| Defendant. |) | |

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By the Chief, Market Disputes Resolution Division, Enforcement Bureau:

Released February 15, 2023

I. Introduction

This Order addresses AEP Texas Inc.'s (AEP) Motion to Compel Supplemental Responses to AEP Texas Inc.'s First Set of Interrogatories filed on January 30, 2023¹ and certain issues raised by the parties' Joint Statement filed on January 31, 2023.²

II. Motion to Compel

AEP filed the Interrogatories at issue here on December 2, 2022.³ AT&T filed an Objection to the Interrogatories on December 9, 2022⁴ and Responses to the Interrogatories on January 20, 2023.⁵ AEP requests that we compel AT&T to supplement its responses to specifically enumerated Interrogatories,⁶ maintaining that “nearly all of AT&T’s interrogatory responses were deficient.”⁷ AT&T urges us to deny the Motion to Compel, raising a number of objections, but, in short, claiming that “[n]one of this information bears on the ‘just and reasonable’ rates required for AT&T’s use of AEP’s poles under 47 U.S.C. § 224(b), and so it is not permissible discovery under 47 C.F.R. § 1.730.”⁸

Section 1.730(b) of the Commission’s rules requires that the proponent of the interrogatories provide an explanation of why the information sought in each interrogatory is both necessary to the resolution of the dispute and not available from any other source.⁹ After considering AEP’s unresolved

¹ Motion to Compel Supplemental Responses to AEP Texas Inc.’s First Set of Interrogatories, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 30, 2023) (Motion to Compel). *See also* 47 CFR § 1.730(h). Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T) filed an Opposition to AEP’s Motion to Compel on February 6, 2023. AT&T’s Opposition to AEP’s Motion to Compel, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Feb. 6, 2023) (Opposition).

² Joint Statement, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 31, 2023).

³ AEP’s First Set of Interrogatories to AT&T, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Dec. 2, 2022) (Interrogatories).

⁴ AT&T’s Objections to AEP’s First Set of Interrogatories, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Dec. 9, 2022) (Objection).

⁵ AT&T’s Responses to AEP Texas Inc.’s First Set of Interrogatories, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 (filed Jan. 20, 2023) (Response). AT&T’s Response encompassed continuing objections to the Interrogatories. *Id.*

⁶ AEP asks the Commission to compel AT&T to respond to Interrogatory Nos. 1, 3, 4, 5, 6, and 8. Motion to Compel at 2-10.

⁷ Motion to Compel at 1. AEP also explained its “good faith” attempt to resolve the discovery dispute. *Id.* *See also* Joint Statement at 9-10.

⁸ Opposition at 1 (emphases in original). AT&T’s Opposition addresses the merits of AEP’s Motion to Compel, but also disputes that AEP made a good faith attempt to resolve the discovery dispute, and therefore, claims the Motion to Compel is procedurally improper. *Id.* at 1; *see also* 47 CFR § 1.729(b). We find no basis to conclude that AEP failed to negotiate in good faith, and thus we address the Motion to Compel on the merits. The parties should note, however, that our general practice is to consider motions to compel discovery filed pursuant to sections 1.729(b) and 1.730(h) of our rules only after a party fails to comply with discovery ordered by staff following the submission of the parties’ joint statement. Where a party is concerned that the scheduled date for closing discovery may not allow sufficient time to resolve a discovery dispute, it should contact the opposing party and staff about the possibility of a schedule extension.

⁹ 47 CFR § 1.730(b).

requests for interrogatories, as well as the explanations and objections thereto, we deny all but one of AEP's requests to compel AT&T to answer the enumerated Interrogatories.

Interrogatory No. 1: AEP requests information regarding how AT&T would calculate the rates it should charge AEP for attachments to AT&T's poles.¹⁰ In response, AT&T states that "until the just and reasonable rate for AT&T's use of AEP's poles is set, it is not possible to specify the corresponding rate that will be appropriate for AEP, given its 'relative usage of the pole (such as the same rate per foot of occupied space).'"¹¹ We agree that the rate AEP should pay for attachments to AT&T poles cannot be determined until the Commission resolves the issues raised in this Complaint concerning the maximum rate AT&T should pay. Consistent with our precedent, if AT&T is entitled to relief, the parties will be directed to negotiate Joint Use Agreement terms that reflect proportional reciprocal rates for AEP's attachments to AT&T's poles. AEP has not demonstrated that additional information is necessary to the resolution of this dispute at this time.¹²

Interrogatory No. 3: AEP requests information about AT&T's internal standards and specifications applicable to AT&T's attachments on joint use poles owned by AEP.¹³ We agree that AT&T's response to Interrogatory No. 3 was deficient.¹⁴ As AEP states, AT&T specifically refers to its "internal pole line design materials," but does not explain or produce those materials. We grant AEP's request to the extent that AT&T must explain fully its internal pole line design materials or produce them.

Interrogatory No. 4: AEP requests that AT&T either state the rates, terms, and conditions of all pole license agreements AT&T has with cable television system or telecommunications carrier attachers on AT&T poles within the AEP service areas during a certain time period or produce unredacted copies of each agreement.¹⁵ We deny AEP's request to compel AT&T to answer Interrogatory No. 4 on relevancy grounds. In explaining its reason for Interrogatory No. 4, AEP points to evidence allegedly showing that AT&T, "as a matter of practice," occupies the lowest position on AEP's poles.¹⁶ However, AEP has conceded that the terms of the parties' Joint Use Agreement do not give AT&T the right to occupy the lowest position on AEP's poles.¹⁷ Accordingly, we agree with AT&T that AEP has not demonstrated that the requested information is necessary to the resolution of this dispute.¹⁸

¹⁰ Interrogatories at 4; Motion to Compel at 2.

¹¹ Response at 4. See Opposition at 3-4.

¹² 47 CFR § 1.730(b). Similarly, AEP has not demonstrated that its proposed modification of Interrogatory 1 is necessary to the resolution of this dispute at this time. See Motion to Compel at 3.

¹³ Interrogatories at 5; Motion to Compel at 3.

¹⁴ Motion to Compel at 1, 4. See Response at 6; Opposition at 5.

¹⁵ Interrogatories at 5; Motion to Compel at 5.

¹⁶ Motion to Compel at 5-6.

¹⁷ Opposition at 7; see also AEP Texas Inc.'s Answer and Affirmative Defenses to AT&T's Pole Attachment Complaint, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 at 22-23, para. 16 (filed Dec. 2, 2022) (Answer).

¹⁸ Opposition at 7. We also note that AEP generically claims that the Commission has recognized that the rates, terms, and conditions an incumbent local exchange carrier (incumbent LEC) offers to attachers on its own poles are relevant in incumbent LEC complaint proceedings. Motion to Compel at 7 & n.12 (citing *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5337, para. 219 (2011) (*2011 Order*)). While the Commission has stated that where "appropriate" it may consider the terms an incumbent LEC offers to attachers on its own poles "including whether they are more or less favorable than the rates, terms and conditions the incumbent LEC is seeking," this is not such a case. *Id.* There is no allegation here that the terms AT&T seeks in this proceeding are more favorable to AT&T than those it accords attachers on its poles. See

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Interrogatory No. 5: AEP requests that AT&T provide information about the size and type of pole AT&T uses when the pole is not subject to a joint use agreement.¹⁹ We deny AEP's request to compel AT&T to respond to Interrogatory No. 5. AEP seeks the information to support its position that, but for the Joint Use Agreement, AEP would have built a network using shorter poles and its "built to suit" network is a material benefit to AT&T.²⁰ AEP contends that if AT&T uses shorter poles when not subject to a joint use agreement, it "corroborate[s] AEP's argument" about what AEP would have done in the absence of the Joint Use Agreement.²¹ We find that AEP has not demonstrated that information from AT&T is necessary to the resolution of this dispute.²²

Interrogatory No. 6: AEP seeks information about the contractors AT&T uses "to set AT&T joint use poles with AEP electric facilities attached to them."²³ We deny AEP's request to compel AT&T to supplement its answer to Interrogatory No. 6 because we agree that AT&T has sufficiently answered the question AEP asked, stating that neither it nor its contractors "'set AT&T's joint use poles with AEP electric facilities attached to them' because utility poles are not set with facilities already attached to them."²⁴ AEP has not demonstrated that additional information is necessary to the resolution of this dispute.²⁵

Interrogatory No. 8: AEP asks AT&T whether it contends that, under the Joint Use Agreement, "each party is allowed to remain attached to the other party's poles following a termination for convenience."²⁶ We deny AEP's request to compel AT&T to answer Interrogatory No. 8. AEP has not alleged in its Answer that the Joint Use Agreement allows a party to remain attached to the other party's poles following termination of the agreement.²⁷ Thus AEP has not put at issue in this proceeding whether the Joint Use Agreement accords that right. As such, we agree with AT&T that AEP has not demonstrated that the requested information is necessary to the resolution of this dispute.²⁸

III. Joint Statement

We note that the parties appear to have a specific dispute about the need for additional evidence related to two of AT&T's witnesses' declarations.²⁹ First, there is a dispute about whether

Opposition at 6-7 (explaining that AT&T has identified the rates it charges attachers on its pole and they are "not 'less favorable than the rates [AT&T] is seeking'"). Accordingly, we are not persuaded that the requested information is necessary to the resolution of this dispute. 47 CFR § 1.730(b).

¹⁹ Interrogatories at 5; Motion to Compel at 7.

²⁰ Motion to Compel at 7-8.

²¹ Motion to Compel at 8. AEP argues that, because AT&T disputes this claim, the types and sizes of poles AT&T uses outside the context of joint use agreements is relevant. *Id.*

²² 47 CFR § 1.730(b). AEP, of course, had the opportunity to attempt to support its argument that it would have built its network with shorter poles in the absence of the Joint Use Agreement by submitting data showing the height of AEP poles in areas not subject to the agreement. *See* Motion to Compel at 8.

²³ Interrogatories at 5; Motion to Compel at 8.

²⁴ Response at 8.

²⁵ 47 CFR § 1.730(b).

²⁶ Interrogatories at 6; Motion to Compel at 10.

²⁷ *See* Answer at 18, para. 14 n.47.

²⁸ 47 CFR § 1.730(b).

²⁹ Joint Statement at 10-13. AEP subsequently filed a Motion to Allow Additional Discovery, in which AEP asks "leave to issue subpoenas duces tecum" to the two AT&T witnesses. Motion to Allow Additional Discovery,

(continued...)

additional evidence should be included in the record concerning AT&T's witness's calculation of the average number of attaching entities input to the pole attachment rate formula.³⁰ In particular, AEP notes that AT&T's witness, Mr. Rhinehart and his team, "filtered AEP's data to identify AEP-owned poles to which AT&T is attached under the JUA."³¹ AEP claims that "the data set provided by AT&T cannot be filtered to that level of detail."³² We believe additional information regarding both parties' calculations of the number of attaching entities is relevant, and likely necessary, to the resolution of this dispute.

Similarly, there is a dispute about whether additional evidence should be included in the record concerning how to determine the amount of space AT&T occupies on AEP's poles as an input to the pole attachment rate formula.³³ In particular, AEP claims that the "Commission's presumption that 18 feet is the average minimum attachment height necessary to obtain minimum ground clearance at midspan" is a "key variable in determining AT&T's actual space occupancy."³⁴ But, AEP argues AT&T's witness, Mr. Peters, "takes exception to that presumption."³⁵ We believe that additional information regarding both parties' positions concerning how to determine space occupied on the pole is relevant and necessary to the resolution of this dispute.

We therefore direct the parties to confer with one another and ensure that they have exchanged with each other, and filed in the record of this case, all data on which either party relied in calculating the average number of attaching entities on AEP's poles, as well as data on which either party relied in determining the amount of space AT&T occupies on AEP's poles. The parties are also encouraged to exchange information with one another about how each party performed its calculations. Any additional exchange or filing of data in this record shall be completed by **February 24, 2023**. By **March 10, 2023**, the parties shall file a supplement to the Joint Statement that stipulates to (1) the average number of attaching entities on AEP's poles for each year from 2018 to 2021 and (2) the amount of space AT&T occupies on AEP's poles for the same time period. If the parties cannot so stipulate, the supplement to the Joint Statement shall set forth in detail (1) how each party calculates the average number of attaching entities on AEP's poles for the years 2018 through 2021, identifying, among other things, the source of the data, the scope of the data (for example, whether it covers poles on which AT&T has no attachments or poles in areas not subject to the joint use agreement at issue here), and any filtering or other operations performed in analyzing or processing the data, and (2) how each party determined the amount of space AT&T occupies on AEP's poles for the same time period, including, if there is a dispute regarding a party's methodology, the basis and explanation of that dispute.³⁶

Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 at 1 (filed Feb. 10, 2023). AT&T has until February 17, 2023 to respond to AEP's motion. 47 CFR § 1.729(e). Therefore, we do not address AEP's Motion to Allow Additional Discovery here.

³⁰ Joint Statement at 11, citing Reply Legal Analysis in Support of Pole Attachment Complaint, Proceeding No. 22-357, Bureau ID No. EB-22-MD-004 at 34 & n.177, Exh A, ATT00282-ATT00283 (filed Jan. 13, 2023). *See also* Joint Statement at 12.

³¹ Joint Statement at 11.

³² Joint Statement at 11.

³³ Joint Statement at 11-13.

³⁴ Joint Statement at 11-12.

³⁵ Joint Statement at 11. AT&T claims that Peters "simply stated that a presumption is not the same as actual data about a specific pole." *Id.* at 13. We note, however, that AT&T states, albeit in response to supplemental briefing, that "AEP withheld relevant information" until after it filed its Reply, which includes information related to the height and space occupied by each party on joint use poles. *Id.*

³⁶ Given the highly complex and technical nature of these requests, we direct the parties to submit this information under oath or affirmation, consistent with the requirement found in section 1.730(e) of our rules. 47 CFR § 1.730(e).

After we have reviewed the parties' supplement to the Joint Statement, we will advise the parties whether briefing on any topics will be required.³⁷ Finally, although AEP states that it remains open to a negotiated resolution through mediation, AT&T does not agree that mediation will be beneficial.³⁸ We encourage the parties to pursue resolving their dispute through negotiation. Commission staff are prepared to assist in any settlement effort, and the parties should notify Commission staff if, after further discussion, they both wish to seek staff-supervised mediation.

We issue this ruling under sections 4(i), 4(j), and 224, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 224, sections 1.3, 1.720-1.740, and 1.1401-1.1415 of the Commission's rules, 47 CFR §§ 1.3, 1.720-1.740, and 1.1401-1.1415 and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 CFR §§ 0.111, 0.311.

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³⁷ Also, AEP states in the Joint Statement that it “believes that this matter should be referred to an Administrative Law Judge.” Joint Statement at 14-15. AEP has not yet filed a hearing designation motion. We note, however, that pole attachment cases are generally “well-suited for resolution on a written record.” *See, e.g.*, Letter from Lisa B. Griffin, Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, to Christopher S. Huther, Counsel for Complainant, and Charles A. Zdebski, Counsel for Defendant, Proceeding No. 20-214, Bureau ID No. EB-20-MD-002 (Mar. 23, 2021) (denying request that the Commission exercise its discretion to issue Hearing Designation Order for parties to proffer live testimony because disagreements on the record for which defendant sought live testimony were “well-suited for resolution on a written record”).

³⁸ Joint Statement at 14. AT&T states that it “remains open to a negotiated resolution.” *Id.*